Fallon-Williams, Inc. and its alter egos G.B.S. Consultants, Ltd., d/b/a Fallon-Williams Services, and Mercury Mechanical Services, Inc. *and* The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 537. Cases 1–CA–34968 and 1–CA–35272

September 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 4, 1998, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondents filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and set forth in full below.

The complaint alleges that the Respondents violated Section 8(a)(5) and (1) of the Act by repudiating their collective-bargaining agreement with the Charging Party Union, by failing to apply the provisions of the agreement to the operations of Respondent Mercury Mechanical Services, Inc. (Mercury), and by failing and refusing to furnish the Union with relevant information. The judge found the violations.[2] Thus, he found that Respondent G.B.S. Consultants, Ltd. (GBS) was the successor to Respondent Fallon-Williams, Inc.[3] and that GBS assumed Fallon-Williams' collective-bargaining agreement with the Union. He also found that GBS and Mercury were alter egos, which means that Mercury, like GBS, was obligated to honor the collective-bargaining agreement. He therefore concluded that Mercury (and its alter ego GBS) acted unlawfully by failing to honor the terms of the contract and by failing to supply the requested information.

1. We agree with the judge that GBS and Mercury are alter egos. In determining whether an alter ego relationship exists, the Board considers whether two entities have substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment.[4] Another relevant factor is whether one entity was created in an attempt to enable another to avoid its obligations under the Act. However, the Board has consistently held that such a motive is not necessary for finding alter ego status.[5]

Here, as the judge found, the parties stipulated that the two entities have substantially identical management, business purpose, operations, equipment, customers, and supervisors, and shared premises and facilities. In addition, Jack Hanrahan is the sole owner of GBS, and his wife is the sole owner of Mercury. The Board has not hesitated to find alter ego status even though entities had different owners, when the owners were in a close familial relationship.[6]

Our dissenting colleague would find that Mercury is not the alter ego of GBS, solely because there is no showing that Mercury was created in order to avoid GBS' obligations under the Act. As our colleague concedes, however, that position has been rejected by the Board and, apparently, by most circuit courts of appeals that have considered the issue.[7] And with good reason. It would be anomalous to allow an employer to walk away from a collective-bargaining agreement merely by changing its name but not the substance of its operations, even if the change in form is neither carried out for a nefarious purpose nor accomplished through deception. As the First Circuit has observed, "if a company merely changed its corporate form for legitimate tax or corporate reasons, it is hard to see why the new entity should be able to disregard an ex-

[1] Stephen J. Fallon Jr. filed a request that the complaint be dismissed as to Fallon-Williams, Inc. and Fallon in his individual capacity or, in the alternative, that the case be remanded to the judge for the taking of additional evidence. Because we find, for the reasons discussed below, that Fallon-Williams did not violate the Act, and because Fallon himself was neither alleged nor found to have acted unlawfully, we find it unnecessary to address this request.

The Respondents have requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] Although the judge did not include the repudiation of the contract in his conclusions of law, his recommended Order includes injunctive relief for that conduct. We therefore infer that the judge found the violation.

[3] See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The judge found that Fallon-Williams and GBS were neither alter egos nor a single employer. He found instead that GBS was the successor to Fallon-Williams, although that relationship was not alleged in the complaint. The judge also found that Fallon-Williams and Mercury were not alter egos or a single employer. No exceptions were filed to any of those findings.

[4] *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

[5] See, e.g., *APF Carting Inc.,* 336 NLRB 73 fn. 4 (2001); *Dupont Dow Elastomers L.L.C.*, 332 NLRB 1071 fn. 1 (2000).

[6] See, e.g., *Crawford Door Sales Co.*, 226 NLRB at 1144.

[7] See, e.g., *Dupont Dow Elastomers L.L.C.*, supra; *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 51 (1st Cir. 1994), cert. denied 516 U.S. 927 (1995); *Goodman Piping Products v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 148 (3d Cir. 1994); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986); *NLRB v. Tricor Products*, 636 F.2d 266, 270 (10th Cir. 1980); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984). But see, *Operating Engineers Local 150 v. Centor Contractors, Inc.*, 831 F.2d 1309, 1312–1313 (7th Cir. 1987); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984); *Plumbers Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470 (9th Cir. 1994).

isting collective-bargaining agreement[.]" *NLRB v. Hospital San Rafael,* 42 F.3d at 51.

In sum, there is no disagreement with our dissenting colleague that all of the elements for finding that Mercury is the alter ego of GBS are present except for unlawful motive. While a colorable case could be made for finding unlawful motive, we need not decide that issue because that factor is not determinative of an alter ego finding. Accordingly, we affirm the judge's finding that the two companies are alter egos.

2. The Respondents have excepted to the judge's finding that Mercury and GBS unlawfully failed to apply the provisions of the contract to Mercury's operations.[8] They contend that Mercury and GBS should be absolved from their duty to apply the contract terms. Thus, by June 1995, Fallon-Williams had fallen more than $100,000 in arrears in payments to the union fringe benefit funds. GBS was attempting to pay off the arrearages and by June 1996 had reduced them to just over $50,000. At that point, the Union exercised its contractual right to remove the employees from GBS while GBS remained delinquent in payments.[9] Although the contract explicitly provides that it shall continue in effect even if the Union does remove the employees, the Respondents argue that the Union, by its actions, made it impossible for them to comply with the contract. Thus, by removing the employees (who assertedly took their company vans home with them and failed to return them for some time), the Union prevented GBS from fulfilling its contracts with customers and, consequently, from making further payments into the funds. Accordingly, the Respondents contend, when Mercury began to operate on a nonunion basis, not applying the collective-bargaining agreement, it was out of necessity, not out of any desire to avoid dealing with the Union. They therefore argue that they should not be held liable for failing to honor the terms of the contract.

We reject those contentions. To begin with, we find the Respondents' "impossibility" argument unpersuasive. The Board has consistently rejected defenses to allegations of 8(a)(5) violations based on the employer's inability to pay.[10] Although here the Respondents argue that their inability to pay was caused by the Union's actions, the fact is that GBS' financial woes were caused not by the Union but by Fallon-Williams' prior failure to make the contractually required payments to the benefit funds. Moreover, the Union was contractually entitled to remove the employees, as the Respondents concede. The contract provision that allowed the Union to remove the employees from GBS jobs without abrogating the contract gave the Union the power to cause difficulties for employers without enabling the employers to walk away from the contract. So, while the Union may have contributed to GBS' difficulties by invoking its rights under this provision, those are the terms the Respondents agreed to.[11] At bottom, the Respondents' "impossibility" defense is that, having failed to comply with the plain terms of the contract, and having provoked a response by the Union that, while perhaps harsh, was expressly permitted by the contract,[12] the Respondents should now be allowed to walk away from the contract altogether and operate nonunion. Needless to say, we reject that contention.

The Respondent also argues that they should not have to pay into the funds during periods in which the Union was refusing to supply employees. We also reject that contention. The contract provides that it shall continue in effect even during periods in which the Union is withholding employees. Contrary to the Respondents' urging, we find nothing unfair in holding them to the terms of the contract they adopted.[13] And the contract explicitly states that such payments are required only for periods in which employees are actually working; thus, the Respondents are liable only for hours during which employees performed work covered by the contract.

We find no merit in the Respondents' further argument that Mercury could ignore the contract because the Union waived its application by denying that it had a contract with GBS. The Respondent argues that, during discussions over the moneys owed to the funds, the Union's negotiators stated that the Union had no contract with GBS.

[8] No exceptions were filed to the judge's finding that the Respondents unlawfully failed to furnish the requested information.

[9] The judge inadvertently stated that this occurred in 1966, rather than 1996. We correct the error.

[10] See, e.g., *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989), in which the Board found an 8(a)(5) violation even though the employer, like GBS, was taking steps to become current in its fringe benefit contributions.

[11] The Respondents' contention that the multiemployer collective-bargaining agreement was a contract of adhesion is without merit. No employer is required to engage in multiemployer bargaining without its consent. See, e.g., *Longshoremen (General Ore, Inc.)*, 126 NLRB 172 (1960). Had Fallon-Williams wished to negotiate different employment terms, it could have timely withdrawn from the multiemployer unit and bargained on an individual basis. And as the successor to Fallon-Williams, GBS was not obliged to adopt the contract. *NLRB v. Burns Security Services*, 406 U.S. at 281–291.

[12] The employees had no contractual right to keep the Respondents' vans when they were not working for the Respondents. There is nothing in the Respondents' offers of proof, however, to indicate that the employees were acting at the Union's request when they failed to return the vans. Moreover, the Respondents' counsel, in his closing argument to the judge, did not contend that the employees' actions in keeping the vans contributed to the Respondents' inability to operate.

[13] The Respondents argue that the judge refused to allow them to introduce testimony concerning the construction of the collective-bargaining agreement and its requirement that they pay into the funds while the Union was withholding employees. That simply is not true. The Respondents made no such proffer at the hearing.

In his affidavit, however, GBS' president conceded that the Union's contract was, in fact, with Fallon-Williams. Moreover, when GBS took over Fallon-Williams' operations and adopted the union contract, it made payments to the funds in Fallon-Williams' name. The Respondents stipulated that the Union was not informed of GBS' takeover of Fallon-Williams. In these circumstances, the Union's statement that it had no contract with GBS likely reflected the Union's understanding of the situation.[14]

Nor do we find merit in the Respondents' argument that the Union is barred by res judicata from litigating its claim for pension moneys because of a default judgment against Mercury in Federal district court. Initially, there is nothing in the record on which the Board could conceivably base a finding of res judicata. The only mention of the judgment in the record is the following statement by the Respondents' counsel at the hearing: "[t]here's an arrearage in the Federal District Court by way of a default judgment." That is all. There is nothing in the record even identifying the parties or describing the particulars of the judgment. The Respondents did not raise the judgment as an affirmative defense in answer to the complaint or make any sort of res judicata argument to the judge.

Moreover, res judicata applies, if at all, only to parties to the judgment and their privies.[15] The Respondents have not shown that either the General Counsel or the Union was a party to the district court litigation. According to the Respondents' brief, the suit was brought by the administrator of the Union's pension funds. It is well established that fund trustees and administrators are separate parties from the unions and employers who establish the funds.[16] The Respondents do not explain why the Union or the General Counsel should be found to be in privity with the pension funds or their officials. In any event, the Board has consistently held that the Government is not precluded from litigating issues of Federal law even though related claims have previously been decided in State or Federal courts in actions to which the Government was not a party.[17] For all of these reasons, the Respondents' res judicata argument must fail. Contrary to the Respondents, however, the Union will not benefit from a double recovery. Our Order requires only that the Respondents make the Union and the funds whole for any losses resulting from the Respondents' unlawful conduct. To the extent that the Respondents have already done so pursuant to the court judgment, our Order will not require them to do so again.

Finally, we find, contrary to the Respondent's assertions, that the Respondents were not prejudiced by the judge's exclusion of certain proffered testimony. The judge allowed the Respondents' attorney to make offers of proof concerning the testimony each witness would have given had he been allowed to testify. Indeed, many of the judge's factual findings were apparently based on those offers of proof. The judge simply found that the facts and arguments that the Respondents proffered were irrelevant. As is evident from our foregoing discussion, we agree with the judge.

For all the foregoing reasons, we adopt the judge's finding that GBS and Mercury violated Section 8(a)(5) by failing to honor the terms of the collective-bargaining agreement since August 18, 1996.[18]

3. The judge found that Fallon-Williams and GBS violated Section 8(a)(5) by failing to stay current in their payments to the funds prior to June 1996. The judge recognized that the Respondents' conduct in this regard took place outside the 10(b) period, but noted that they had not raised the 10(b) statute of limitations as a defense. The Respondents have excepted to those findings, and we find merit in their exception.

Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]" The original charge in Case 1–CA–34968 was filed on February 18, 1997, and was served on Fallon-Williams on February 26, 1997. The 10(b) period thus began on August 26, 1996.[19]

As the judge indicated, Section 10(b) is an affirmative defense that is waived unless it is raised in a timely fashion.[20] The doctrine of waiver does apply here, to a limited

[14] The Respondent also argues that the Union was trying to put GBS out of business, and that the Union's conduct therefore was no longer protected activity. Nonetheless, in their answer to the complaint, the Respondent's explicitly acknowledged that the Union's actions were protected under the Act.

[15] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 5 (1979).

[16] *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981).

[17] See, e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998); *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Service Employees v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).

[18] The judge's recommended Order is modified to reflect that employees shall receive backpay computed in the manner specified in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and shall be reimbursed for any expenses they may have incurred as a result of the Respondents' unlawful failure to make payments into the funds, as discussed in *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Payments into the funds shall be made as discussed in *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).

[19] See, e.g., *Dun & Bradstreet Software Services*, 317 NLRB 84, 85 (1995), affd. sub nom. *Kelley v. NLRB*, 79 F.3d 1238 (1st Cir. 1996).

[20] *Public Service Co.*, 312 NLRB 459, 461 (1993).

extent. It prevents Respondents from now raising Section 10(b) as a defense to the complaint's allegation of violations dating from August 18, 1996 (the date 6 months before the charge was filed, not served, and several days before the start of the 10(b) period). The Respondents thus are liable for the violations found above beginning on August 18, 1996, as the complaint alleged.

But the judge erred in finding a violation related to conduct that occurred prior to June 1996. The complaint did not allege any unlawful conduct during 1995 and early 1996, and nothing in the record suggests that the General Counsel intended to litigate, or did litigate, any issues other than those pleaded in the complaint. There is no basis, then, for finding that Respondents violated Section 8(a)(5) during that period. The failure to raise a 10(b) defense is immaterial, since there was no reason to assert it.

We shall, therefore, dismiss the complaint with regard to Fallon-Williams (which permanently ceased to perform work in June 1995), and we find that GBS (and Mercury) violated the Act only beginning August 18, 1996. We shall revise the judge's recommended Order and notices accordingly.[21]

ORDER

The National Labor Relations Board orders that the Respondents, G.B.S. Consultants, Ltd., d/b/a Fallon-Williams Services, and Mercury Mechanical Services, Inc., Quincy, Massachusetts, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and refusing to honor the collective-bargaining agreements between the New England Mechanical Contractors Association Incorporated (NEMCA) and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 537, unless and until they have ended their assent to such agreements pursuant to the terms of such agreements.

(b) Failing to provide information requested by Local 537 where such information is necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of Mercury's employees who are members of the following unit:

> All journeymen and apprentices employed by the Respondents performing the work of erecting, rigging, installing, joining together, dismantling, adjusting, altering, repairing, maintaining, and servicing any and all types of refrigeration and food cases and air conditioning equipment for any and all purposes, excluding guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole their unit employees by paying to them the amounts due by reason of GBS's and Mercury's failure since August 18, 1996, to comply with the 1995–1998 collective-bargaining agreement between NEMCA and Local 537 and any follow-on agreements, as provided in the remedy section of this decision.

(b) Make whole Local 537 and its associated benefit funds by making the payments mandated by the 1995–1998 collective-bargaining agreement between NEMCA and Local 537, and any follow-on agreements, that GBS and Mercury failed to make since August 18, 1996, as provided in the remedy section of this decision.

(c) Make whole the unit employees of GBS and Mercury by reimbursing them for any expenses that the employees may have incurred that resulted from failures to make required benefit fund payments since August 18, 1996, as provided in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Provide to Local 537 the information about Mercury sought by the Union's January 9, 1997, letter to John Handrahan.

(f) Within 14 days after service by the Region, post at their facility in Quincy, Massachusetts, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by representatives of GBS and Mercury, shall be posted by them immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are cus-

[21] Since we find no violations on the part of Fallon-Williams, we shall not require the Respondents to make the employees whole for expenses they may have incurred as a result of Fallon-Williams' failure to make payments into the funds. GBS and Mercury will be required to make employees whole only for any expenses they may have incurred because of the Respondents' failure to pay into the funds since Aug. 18, 1996. *Kraft Plumbing & Heating,* supra.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tomarily posted. GBS and Mercury shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, either GBS or Mercury has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondents at any time since August 18, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the GBS and Mercury have taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent GBS is a successor to the Respondent Fallon-Williams and that the two firms are not a single employer or alter egos. I also note that there are no exceptions to the conclusion that GBS and the Respondent Mercury Mechanical Services are a single employer. However, I do not agree with my colleagues that Mercury has been shown to be an alter ego of GBS. In my view, in order for the General Counsel to meet his burden of showing that one entity is an alter ego of another, he must show that the transaction between the two was motivated by an intent to avoid legal obligations under the Act. The General Counsel has failed to make that showing in this case.

The factors for establishing single employer status are: interrelation of operations, common management, centralized control of labor relations and common ownership or financial control. *Radio & Television Broadcasting Local 1264 v. Broadcast Service of Mobile, Inc*., 380 U.S. 255 (1965). The factors for establishing alter ego status are: substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment. In addition, the Board considers whether there was an intention to avoid statutory obligations.[1] Indeed, some courts hold that a finding of such an intention is a sine qua non for alter ego status.[2] Other courts have held that such intention is a relevant factor, but not a necessary one.[3] However, at least one of those other courts has expressed concern as to whether the Board's view is the better one.[4] As set forth below, I agree with those courts that hold that such intention is a necessary factor.

My colleagues have found alter ego status as between GBS and Mercury, without a finding that these companies acted for an illegal motive, i.e., to avoid obligations under the Act. As noted above, I believe that such a finding is necessary. The differences between "alter ego" and "single employer" are significant. In a "single employer" situation, a contract covering one entity will apply to another entity if the two companies satisfy the criteria for single employer status *and* the two sets of employees have such a community of interest that they are appropriately in the same bargaining unit.[5] By contrast, in the "alter ego" situation, the contract that covers one entity will be applied to the other entity, provided *only* that the criteria for "alter ego" are met. There is no necessity for showing that two sets of employees share a community of interest. It is only necessary to show that the one entity is the "disguised continuance" of the other.[6]

The phrase "disguised continuance" is a key to the resolution of the issue before us. The phrase indicates an element of deception, i.e., the actor wishes to conceal the fact that the new entity is the same as the first one. There is a reason for the deception and for the desire to conceal; the actor seeks, through the disguise, to avoid a legal obligation.

Because the term "disguised continuance" connotes an element of deception, and because the consequences of an "alter ego" finding are greater (contract will apply, without the necessity for showing community of interest), I conclude that a showing of intention to evade is essential to "alter ego" status. In addition, my analysis manifests an appropriate regard for Section 7 rights. As discussed, in single employer cases, the contract will apply to the second entity if the employees of the second entity are deemed to be in the same bargaining unit as those of the first. Although the employees of the second entity do not get an opportunity to vote on the issue of union representation, it is appropriate to cover them with union representation, for they are essentially new employees coming into an extant represented unit. By contrast, as discussed above, in an "alter ego" situation the employees are covered by the union contract without regard to unit issues. In my view, this is appropriate *if* unlawful motive can be shown. For, if there is an unlawful motive, the Board must

[1] *Crawford Door Sales Co*., 226 NLRB 1144 (1976).

[2] *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305 (8th Cir. 1984), cert. denied 469 U.S. 1088 (1984); and *Plumbers Local 343 v. Nor-Cal Plumbing*, 48 F.3d 1465, 1470 (9th Cir. 1994), cert. denied 516 U.S. 912 (1995). See also *Operating Engineers Local 150 v. Centor Contractors, Inc.*, 831 F.2d 1309, 1312–1313 (7th Cir. 1987) (in enforcing arbitration award, finds unlawful motive or intent are critical inquiries in an alter ego analysis).

[3] E.g., *Goodman Piping Products v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984); and *NLRB v. Allcoast Transfer, Inc*., 780 F.2d 576, 581 (6th Cir. 1986).

[4] *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 148 (3d Cir. 1994) ("while we are by no means sure that we would select the Board's test if we were choosing our own, we find that test to be a permissible construction of the Act").

[5] *South Prairie Construction Co. v. NLRB*, 425 U.S. 800 (1976).

[6] *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942).

restore the status quo ante the unlawful conduct. It is therefore appropriate to bind the "alter ego" (the disguised continuance) to the contract. However, absent such an unlawful motive, there is no warrant for subjecting the employees of the other entity to a union contract without their consent.

My colleagues say that the absence of a finding of alter-ego status would mean that the employer could "walk away" from its contract with the union. However, as discussed above, a single employer will be bound to the contract, and there can be single-employer status, even in the absence of an alter-ego relationship. Such status depends on a finding of a single unit, i.e., a community of interest. My colleagues would find alter ego status, and a conclusion of contract application, without regard to such unit issues.

Since I agree with those courts which hold that unlawful motivation is a sine qua non for alter ego status, and since there is no finding of such motive here, I conclude that alter ego status has not been shown.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate or refuse to honor the collective-bargaining agreements between the New England Mechanical Contractors Association Incorporated (NEMCA) and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 537, unless and until we have ended our assent to such agreements pursuant to the terms of such agreements.

WE WILL NOT fail to provide information requested by Local 537, where such information is necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of our employees who are members of the following unit:

> All journeymen and apprentices performing the work of erecting, rigging, installing, joining together, dismantling, adjusting, altering, repairing, maintaining, and servicing any and all types of refrigeration and food cases and air conditioning equipment for any and all purposes, excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole our unit employees by paying to them, with interest, the amounts due by reason of our failure and the failure of Mercury Mechanical Services to comply with the collective-bargaining agreements between NEMCA and Local 537, since August 18, 1996.

WE WILL make whole Local 537 and its associated benefit funds by making the payments mandated by the collective-bargaining agreements between NEMCA and Local 537, and any follow-on agreements, that we and Mercury failed to make since August 18, 1996.

WE WILL make whole our unit employees by reimbursing them, with interest, for any expenses that they may have incurred that resulted from our failure, and the failure by Mercury, to make required benefit fund payments since August 18, 1996.

GBS CONSULTANTS, LTD.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate or refuse to honor the collective-bargaining agreements between the New England Mechanical Contractors Association Incorporated (NEMCA) and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 537, unless and until we have ended our assent to such agreements pursuant to the terms of such agreements.

WE WILL NOT fail to provide information requested by Local 537, where such information is necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of our employees who are members of the following unit:

> All journeymen and apprentices performing the work of erecting, rigging, installing, joining together, dismantling, adjusting, altering, repairing, maintaining, and servicing any and all types of refrigeration and food cases and air conditioning equipment for any and all purposes, excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole our unit employees by paying to them, with interest, the amounts due by reason of our failure and the failure of G.B.S. Consultants, Ltd., to comply with the collective-bargaining agreements between NEMCA and Local 537, since August 18, 1996.

WE WILL make whole Local 537 and its associated benefit funds by making the payments mandated by the collective-bargaining agreements between NEMCA and Local 537, and any follow-on agreements, that we and G.B.S. failed to make since August 18, 1996.

WE WILL make whole our unit employees by reimbursing them, with interest, for any expenses that they may have incurred that resulted from our failure, and the failure by G.B.S., to make required benefit fund payments since August 18, 1996.

MERCURY MECHANICAL SERVICES, INC.

Scott R. Kardel, Esq., for the General Counsel.
David G. Hanrahan, Esq. (Gilman, McLaughlin & Hanrahan), of Boston, Massachusetts, for the Respondent.
Burton Rosenthal, Esq. (Siegal, Roitman & Coleman), of Boston, Massachusetts, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The New England Mechanical Contractors Association Incorporated (NEMCA) is an organization of employers engaged in the heating, ventilating and air-conditioning (HVAC) business. One of NEMCA's purposes is to represent its employer-members in negotiating and administering collective-bargaining agreements with various unions, including the Charging Party, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 537 (Local 537 or the Union). At all material times the Association and Local 537 have been parties to collective-bargaining agreements. In such agreements NEMCA has recognized Local 537 to be "the sole collective bargaining agency" for the following employees:

> All journeymen and apprentices performing the work of erecting, rigging, installing, joining together, dismantling, adjusting, altering, repairing, maintaining, and servicing any and all types of refrigeration and food cases and air conditioning equipment for any and all purposes.[1]

The current agreement covers the period September 1, 1995, through August 31, 1998.[2] (In this decision when I refer to "the collective bargaining agreement," I will be referring to the 1995–1998 agreement.)

In April 1980 a company in the HVAC business named Fallon-Williams, Inc. (one of the Respondents in this proceeding) began an 8(f) relationship with Local 537 by entering an assent to the collective-bargaining agreement then in effect between the Union and NEMCA, thereby binding Fallon-Williams to the terms of that agreement with respect to work within the scope of the agreement.

Fallon-Williams remained bound to successive collective-bargaining agreements between the Association and Local 537, including the 1995–1998 agreement referred to above.

The Local 537 collective-bargaining agreements to which Fallon-Williams was a party required employers to, among other things, pay specified amounts per employee hour into funds associated with Local 537, including, for example, a health and hospitalization fund, a pension fund and a vacation fund. (Hereafter I will refer collectively to all such funds as the Union Funds.)

Fallon-Williams continued its collective-bargaining relationship with Local 537 in the years after 1980 and, apparently, complied with its obligations under the various successor collective bargaining agreements with, however, one important exception. The Company did not stay current in its payment to the Union Funds. As a result, by June 1995 Fallon-Williams owed the Funds more than $100,000.

GBS Comes into Existence

Fallon-Williams had two owners and managers: Steven J. Fallon, Jr. (who was Fallon-Williams' President) and John F. Handrahan. In June 1995 Fallon ended his connection with Fallon-Williams, and Fallon-Williams permanently ceased to perform work. Fallon-Williams did not notify Local 537 about this cessation of business.

Shortly before Fallon-Williams ended its operations, Handrahan (Fallon-Williams' other owner and manager), formed a new corporation called G.B.S. Consultants, Ltd.[3] It did business as Fallon-Williams, Fallon-Williams Services, and, sometimes, Fallon-Williams Co. Inc.[4] But in this decision I will refer to this second company as GBS.

Handrahan is GBS's President, its sole director, and its only owner. Upon Fallon-Williams' demise, GBS purchased all of

[1] The quotation is from the collective-bargaining agreement. The unit to which the complaint refers (and which is admitted to by the Respondents) is worded differently in ways that are not material to this proceeding. All parties agree that the unit is appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

[2] That agreement is in the record as GC Exh. 2, Attachment 6. I note, in this regard, that there are only two numbered exhibits in the record, GC Exhs. 1 and 2. GC Exh. 1 is the formal papers. GC Exh. 2 is a "Stipulation of Facts." There are six attachments to GC Exh. 2: GBS's Articles of Organization (Attachment 1); an affidavit of John F. Handrahan (No. 2); a series of "employer reports" showing GBS's payments to the Union Funds (although in the reports the "Employer" is listed as "Fallon-Williams") (No. 3); the Articles of Organization of Mercury Mechanical Services (No. 4); GBS's invoices to Mercury (although the invoices purport to be from "Fallon-Williams Co. Inc.") (No. 5); and the 1995–1998 collective-bargaining agreement (No. 6).

[3] At the hearing on June 22 I granted the General Counsel's motion to amend the complaint by adding GBS Consultants, Inc. [sic] d/b/a Fallon-Williams Services as an additional alter ego. Prior to this amendment the complaint did not refer to GBS.

[4] In that last respect, see fn. 2, supra.

Fallon-Williams' assets and assumed its contracts and liabilities, including Fallon-Williams' 8(f) contract with Local 537 and Fallon-Williams' debt to the Union Funds. GBS had identical or substantially identical business operations, management (except for Fallon's departure), facilities, employees, equipment, working conditions and supervisors as Fallon-Williams. GBS did not notify Local 537 about its relationship to Fallon-Williams or its assumption of Fallon-Williams' obligations under the collective bargaining agreement. (While GBS did communicate with the Union Funds—in the process of making its monthly payments to the Funds—GBS did so using its doing-business-as name: "Fallon-Williams.")

In large part GBS met its contract obligations to Local 537 and to the Union Funds. All of GBS's bargaining unit employees were members of Local 537, GBS remunerated them in accordance with the collective-bargaining agreement, and GBS substantially reduced its (previously Fallon-Williams') debt to the Union Funds.

The General Counsel and Local 537 argue that GBS was an alter ego of and a single employer with Fallon-Williams.

As for Fallon-Williams and GBS being a single employer, that is not the case. Fallon-Williams ceased doing business before GBS began operating, a circumstance antithetical to a single employer relationship which, after all, is characterized by interrelated operations. *Hartman Mechanical, Inc.*, 316 NLRB 395, 401 (1995).

I conclude also that GBS was not the alter ego of Fallon-Williams.

The many ways that GBS was identical or substantially identical to Fallon-Williams obviously point toward an alter ego relationship. So does GBS's use of the "Fallon-Williams" name and Fallon-Williams' and GBS's failure to notify the Union about Fallon-Williams' cessation of business and about the existence of GBS and its stepping into Fallon-Williams' shoes.

But Handrahan's motive in switching from Fallon-Williams to GBS was not an illegal one; as noted, GBS assumed Fallon-Williams' obligations under the collective-bargaining agreement. And there was a major shift in ownership. (I note, in this regard, that Fallon and Handrahan are not members of the same family.)

As for the lack of an illegal motive, "the Board does not require . . . that an illegal motive be established in order to find alter ego status." *Johnstown Corp*., 313 NLRB 170, 171 (1993), affd. in pertinent part sub nom. *Stardyne, Inc. v. NLRB,* 41 F.3d. 141, 144 (3d Cir. 1994).

On the other hand, illegal motivation, or the lack of it, is a factor to take into account in determining whether one entity is an alter ego of another. E.g., *NLRB v. Hospital San Rafael, Inc.,* 42 F.3d 45, 51 (1st Cir.), cert. denied 516 U.S. 927 (1994). Indeed, "an attempt to avoid the obligations of a collective bargaining agreement" is virtually part of the definition of an "alter ego." See *Electronic Data Systems Corp.*, 305 NLRB 219 (1991), enfd. in pertinent part 985 F.2d 801 (5th Cir. 1993). And here GBS explicitly assumed Fallon-Williams' obligations under the collective-bargaining agreement.

As for the shift in ownership, it is true that an alter ego relationship does not hinge on identical ownership. Still, where the Board has found alter ego status notwithstanding differences in ownership, the ownership changes have generaly involved shifts from husband to wife, father to son, or the like. See, e.g., *Sobeck Corp.*, 321 NLRB 259 (1996). Here Handrahan went from being a half-owner of Fallon-Williams to being the sole owner of GBS. Surely that is not a "mere technical change" in ownership, but rather is one that amounts to a change that is "substantial." *Howard Johnson Co v. Hotel Employees*, 417 U.S. 249, 259 at fn. 5 (1974).

While GBS is thus neither an alter ego of Fallon-Williams nor a single employer with Fallon-Williams, GBS is beyond all question a successor to Fallon-Williams. GBS, after all, continued Fallon-Williams' business, acquired and thereafter utilized in its business Fallon-Williams' facilities, equipment and other assets, and employed the bargaining unit employees that had previously been working for Fallon-Williams. See generally *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). And "in a variety of circumstances, involving a[n] . . . assets purchase, the Board might properly find as a matter of fact that the successor has assumed the obligations of the old [collective bargaining] contract." *Burns*, supra, 406 U.S. at 291; accord: *Volk & Huxley*, 280 NLRB 219, 226 (1986), enfd. 817 F.2d 996 (2d Cir.), cert. denied 484 U.S. 925 (1987). Here, the facts compel just such a finding, particularly, of course, because GBS explicitly "assumed the contracts . . . of Fallon-Williams, Inc., including the collective bargaining agreement with the Union."[6]

The Switch From GBS to Mercury Mechanical Services

As touched on above, GBS substantially reduced its debt to the Union Funds, from more than $100,000, which was the amount that Fallon-Williams owed the Funds when GBS assumed Fallon-Williams' liabilities, to about $52,000. But the Union Funds treated GBS's payments as reductions in past-due amounts, not as payments covering GBS's current operations. (There is no dispute about the propriety of that treatment by the Funds of GBS's payments.) As a result, as of June 1996 GBS was 3 months in arrears to the Union Funds.

The collective-bargaining agreement, at article XXI(c), includes the following provision:

> During any period of delinquency of wages or fringes, the Union shall have the right to remove all Employees of the delinquent Employer from their work for that Employer, but in such event this Agreement shall remain in full force and effect during the period of delinquency.

In June 1966 the Union removed all of GBS's bargaining unit employees pursuant to this provision. This precluded GBS from meeting numerous commitments it had made to its customers. (That, in turn, precipitated GBS's bankruptcy filing.)

About 3 months earlier, Handrahan had created Mercury Mechanical Services, Inc. Mercury's articles of organization list Handrahan's wife, Margaret Curran, as Mercury's sole incorporator, officer and director. As Handrahan put it (in an affidavit): "Mercury Mechanical is a company that I set up . . . and put my wife's name on as the sole officer."[7] Handrahan created Mercury because of his and GBS's many debts and because Handrahan wanted to have another business entity in

[6] The quotation is from GC Exh. 2, p. 2. The complaint does not allege that GBS is a successor to Fallon-Williams. But the question of whether there is a successor relationship was litigated.

[7] GC Exh. 2, Attachment 2, p. 3.

wanted to have another business entity in being in the event that GBS went into bankruptcy.

When Local 537 pulled all of GBS's employees, Handrahan began using Mercury to perform what had been GBS's business (maintenance and construction of HVAC systems), for a while doing so as a subcontractor to GBS. Mercury initially subcontracted out the work that it undertook to perform. But then Mercury switched to using its own employees. The parties have stipulated that Mercury

> has identical or substantially identical management (in that Jack Handrahan hired all of the employees of Mercury), business purpose (service and maintenance of HVAC systems), operations, equipment (vans leased by Mercury from GBS), customers, supervisors (Jack Handrahan) as, and shared common premises and facilities . . . with GBS.

Mercury did not comply in any respect with the terms of the collective-bargaining agreement. For example, Mercury has never paid its employees at the rates specified in the collective-bargaining agreement and it has made no payments to the Union Funds.

Mercury, plainly, was and is an alter ego of GBS.

As for Handrahan's motive in utilizing Mercury to perform the kind of work in which GBS had been engaged, the General Counsel and Local 537 sought to call witnesses for the purpose of proving that Handrahan formed Mercury for the purpose of evading GBS's responsibilities under the Act. The Respondents sought to call a witness for the purpose of proving the opposite. I refused to permit any testimony on the subject even though (as touched on earlier) illegal motivation is a factor to consider in determining alter ego status. I made that ruling because the alter ego status of Mercury was already so patent as a result of the stipulations of the parties and the Respondents' admissions.

In addition to Mercury's alter ego status, Mercury was, and is, a single employer with GBS in that GBS and Mercury, "in reality, constitute only *one integrated enterprise*." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982 (emphasis in original).[8] In this connection I note that Handrahan's motive in creating Mercury—good or bad—is of little moment for the purpose determining whether GBS and Mercury are a single employer. See *Hospital San Rafael, Inc.,* supra at 50.

The complaint alleges that Mercury is an alter ego of, and a single employer with, Fallon-Williams, not GBS. But the nature of the relationship between Mercury and GBS clearly was litigated.

As for the relationship between Mercury and Fallon-Williams, Mercury is neither an alter ego of, nor a single employer with, Fallon-Williams. On the other hand, given Mercury's alter ego and single employer status with GBS, and given that GBS is a successor to Fallon-Williams, Mercury is also a successor to Fallon-Williams and, like GBS, is bound by the collective-bargaining agreement between NEMCA and Local 537. See, e.g., *Sobeck Corp.*, supra, 321 NLRB at 266–267.

On January 9, 1997, Local 537 wrote to Handrahan, asking for information about Fallon-Williams and Mercury, information that was necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of Mercury's bargaining unit employees. The Respondents did not respond to the Union's letter. Mercury seeks to excuse this failure to provide the requested information on the ground that at all material times Local 537 has had all of the information about Fallon-Williams that the Union's questions seek. But even assuming that this otherwise would be a valid defense, many of the Union's questions specifically concerned Mercury, not Fallon-Williams.[9]

The Respondents' Defenses

I refused to permit the Respondents to present evidence relevant to several contentions that, the Respondents claim, explain why they should not be held to have violated the Act.

1. The Respondents argue that Mercury and GBS are deeply in debt and are without the resources needed to pay the Union Funds the amounts owed or to pay Mercury's employees in accordance with the collective-bargaining agreement. The Board, however, "has long held that the inability to pay is not a defense to the allegation that Respondent has failed to make payments as required under the parties' collective bargaining agreement." *Sonya Trucking Co.*, 312 NLRB 1159 fn. 1 (1993).

2. The Respondents contend that the Union, by removing all of GBS's employees, made it impossible for GBS (or Mercury) to comply with the Respondents' contractual obligations. The Respondents' problem here is that the collective-bargaining agreement specifically provides that even if the Union does "remove all Employees of the delinquent Employer," the "Agreement shall remain in full force and effect during the period of delinquency." It may be that, as the Respondents claim, this provision demonstrates that the collective-bargaining agreement is a "contract of adhesion," at least insofar as the Respondents are concerned. Tr. at 22. But that does not excuse an employer's failure to comply with the terms of a collective-bargaining agreement to which the employer had agreed to be bound. Cf. *W.J. Holloway & Son*, 307 NLRB 487, 489 (1992).

3. According to the Respondents, the Union reneged on its obligations under an oral settlement agreement pursuant to which GBS would have paid some of the amounts owing to Local 537 and the Union would "send the men back." Tr. 24. I know of no instance, however, where the Board has held that an oral settlement agreement constitutes a defense to alleged violations of the Act, particularly an agreement which is not claimed to have included any undertaking to withdraw, or to forego the filing of, an unfair labor practice charge.

The Violations of the Act

Mercury, obviously, violated Section 8(a)(5) and (1) when it failed to abide by the terms of the collective-bargaining agree-

[8] In so concluding, I have specifically taken into account that entities that are in an alter ego relationship are not necessarily also in a single employer relationship. See *Johnstown Corp.*, 322 NLRB 818 (1997).

[9] The information request does not ask for information about GBS, apparently because Local 537 did not then know of GBS's existence. As will be touched on in the remedy section, the Union, armed with the information that this litigation has provided, wants information only about Mercury.

ment and when it failed to respond to Local 537's request for information.

Since GBS is the alter ego of Mercury, and since GBS is a single employer with Mercury, Mercury's violations of the Act are equally GBS's. E.g., *Dahl Fish Co.,* 299 NLRB 413, 418 (1990); *Las Villas Produce*, 279 NLRB 883 (1986).

GBS failed to stay current in its payments to the Union Funds even before Mercury arrived on the scene. That constituted a violation of Section 8(a)(5) and (1) by both GBS and Mercury. The first unfair labor practice charge in this proceeding was filed on February 18, 1997, and GBS's behavior here under discussion occurred prior to June 1996, which was more than 6 months prior to the charge. But the Respondents have not raised Section 10(b) as a defense. See, e.g., *Christopher Street Corp.*, 286 NLRB 253 (1987).

Fallon-Williams has no alter ego or single employer relationship with either GBS or Mercury. And Fallon-Williams may not be held responsible for the violations of the Act of GBS or Mercury merely because they are Fallon-Williams' successors. But Fallon-Williams, like GBS, violated Section 8(a)(5) and (1) by failing to stay current in its payments to the Union Funds. I am hesitant to make such a finding since, according to the record here, Fallon-Williams stopped operating in June 1995; that is, all of its violations of the Act occurred more than 19 months prior to the unfair labor practice charge. But as I understand the Board's teachings (and as touched on above), Section 10(b) does not come into play unless raised as a defense.

CONCLUSIONS OF LAW

1. Local 537 is a labor organization within the meaning of Section 2(5) of the Act.

2. Fallon-Williams, Inc., was, and GBS Consultants, Ltd., and Mercury Mechanical Services are, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All journeymen and apprentices employed by the Respondents performing the work of erecting, rigging, installing, joining together, dismantling, adjusting, altering, repairing, maintaining and servicing any and all types of refrigeration and food cases and air conditioning equipment for any and all purposes, excluding guards and supervisors as defined in the Act.

1. GBS is a successor to Fallon-Williams and is required to adhere to the collective-bargaining agreements between NEMCA and Local 537 unless and until GBS has ended its assent to such agreements pursuant to the terms of such agreements.

2. Mercury is an alter ego of and a single employer with GBS.

3. Fallon-Williams, GBS and Mercury violated Sec 8(a)(5) and (1) of the Act by failing to abide by the terms of collective-bargaining agreements between Local 537 and NEMCA.

4. Mercury and, by virtue of its single employer and alter ego status, GBS, violated Section 8(a)(5) and (1) by failing to provide information sought by Local 537, which information was necessary for and relevant to the Union's performance of its duties as the collective-bargaining representative of Mercury's bargaining unit employees.

REMEDY

GBS and Mercury

Mercury employed employees to perform bargaining unit work at rates of remuneration below those specified in the 1995–1998 collective-bargaining agreement between NEMCA and Local 537. Additionally both GBS and Mercury failed to make payments to the Union Funds.

The Respondents contend that the usual remedy in these circumstances would not result in any substantial payments either to the employees involved or to the Union Funds (due to the desolate financial circumstances faced by both GBS and Mercury) and that, accordingly, the only impact of the Board's ordering such a remedy would be the collapse of Mercury. That, however, is a matter for consideration by the parties in connection with any further settlement discussions in which they may choose to engage; it is not a factor that can here be taken appropriately into account in fashioning a remedy.[10]

It may be that employees of Fallon-Williams incurred some expenses as a result of that Company's violations of the Act (as discussed below). GBS and Mercury, as Fallon-Williams' successors, are jointly and severally liable to those employees for those expenses.

The recommended Order therefore requires that GBS and Mercury:

> 1. Abide by the terms of the current collective-bargaining agreement between NEMCA and Local 537.
> 2. Jointly and severally pay to their unit employees, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987):
>
> (a) the difference between (i) the remuneration that Mercury's unit employees did receive, and (ii) such amounts as those employees would have received had Mercury complied with the applicable collective bargaining agreements, and
>
> (b) any expenses incurred by the unit employees of Fallon-Williams, GBS and Mercury that resulted from Fallon-Williams', GBS's, or Mercury's failure to make required benefit fund payments.
>
> 3. Jointly and severally make whole Local 537 and its associated funds for the losses suffered from GBS's and Mercury's failure to comply with their contractual obligations.[11] See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

Turning to the Respondents' failure to respond to Local 537's information request, at this juncture the Union seeks only that part of the requested information that relates specifically to Mer-

[10] GBS's and Mercury's financial circumstances suggest that the usual notice language ("WE WILL make whole our employees . . . .") will be misleading in the sense that it is unlikely that any of GBS's or Mercury's employees will in fact be made whole. But it does not appear to be Board policy to take that into account. See, e.g., *Redway Carriers,* 301 NLRB 1113, 1118 (1991).

[11] Although make whole remedies are generally limited to those violations of the Act that occurred within 6 months of the unfair labor practice charge, as discussed above the Respondents did not raise Sec. 10(b) as a defense.

cury (as opposed to information about either Fallon-Williams or GBS). The recommended order requires GBS and Mercury to provide this information about Mercury.

Fallon-Williams

The recommended order requires Fallon-Williams to cease failing to honor its contractual obligations toward Local 537. See *Redway Carriers,* supra, fn. 10*,* 301 NLRB at 1113 ("It is well settled that mere discontinuance in business does not necessarily render moot allegations of unfair labor practices against a respondent").

Fallon-Williams' indebtedness to the Union Funds was paid in full by GBS and, therefore, no make whole remedy requiring payment by Fallon-Williams to the Union Funds is warranted. It is conceivable, however, that some of Fallon-Williams' employees incurred expenses as a result of Fallon-Williams' failure to make required benefit fund payments. The recommended order requires Fallon-Williams, jointly and severally with GBS and Mercury, to make whole, with interest, any Fallon-Williams employees who suffered such expenses. Interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Fallon-Williams' cessation of operations in June 1995 raises an issue about what to do about a notice to employees. The recommended order deals with this by requiring Fallon-Williams to mail copies of a notice to all unit employees it employed subsequent to the date on which Fallon-Williams first failed to make the required payments to the Union Funds.

[Recommended Order omitted from publication.]